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Supreme Court, U.S.
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No. 02-0027

In The
Supreme Court of the United States

ALLINA HEALTH SYSTEM CORP., et al.,

Petitioners,

v.

MINNESOTA ASSOCIATION OF NURSE ANESTHETISTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In a situation where there is no material split in the Circuits, should this Court grant interlocutory review of a carefully considered, detailed decision of the Eighth Circuit Court of Appeals which applied existing precedents to the specific facts of this case and determined that there are material disputes of fact which preclude summary judgment and require that the matter be submitted to a jury?

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STATEMENT

This is an action brought under the False Claims Act by relator, Minnesota Association of Nurse Anesthetists ("MANA"), alleging Petitioners (doctors and hospitals) knowingly submitted false claims for medical services to the United States Government. In particular, Petitioners falsely represented to Medicare that anesthesiologists performed anesthesia when they knew that those anesthesiologists were not even in the operating room when the work was actually being performed by MANA's nurse anesthetists. The hospitals were also alleged to have submitted thousands of false claims representing that two anesthesia providers had provided services during surgeries when both they and the doctors knew that only one provider was present.[1] It is further alleged that Petitioners

[1] Similar allegations have already been successfully prosecuted by the United States Government against other defendants in *United States ex rel. Poulton v. Anesthesia Associates of Burling, Inc.*, 87 F.Supp. 2d 351 (D. Vermont 2000) (in action that settled, the government alleged anesthesiologists failed to perform the services required to bill for medical direction and that routine billing for "medically directed anesthesia services where these requirements were not met constituted a violation of the False Claims Act"); *Anesthesiologists Affiliated v. Sullivan*, 941 F.2d 678 (8th Cir. 1991) (the government brought an action against anesthesiologists under the administrative False Claims Act for "knowingly" submitting 208 false Medicare claims which were for services they did not provide); *United States v. Askanazi*, 1:98-CR-130 (W.D. Mich. 1998) (November 5, 1988 Indictment ¶ 33) (anesthesiologists indicted and convicted under mail fraud statute for "billing Medicare for medically directing the provision of anesthesia services to patients by others when, in fact, at the same time he was performing surgical procedures on other patients and did not provide medical direction").

sought to conceal their fraud by altering patient medical records.[2]

On March 17, 1999, the District Court granted summary judgment and dismissed the case holding that MANA was not an "original source" and that Petitioners did not submit false claims as a matter of law. Pet. App. at 82. Respondent appealed and the Government filed an amicus brief in support of MANA's appeal taking strong exception to the District Court's decision on the merits arguing that Respondent's allegations, if true, did constitute false claims which caused the Government to overpay for the services.[3] The Eighth Circuit unanimously reversed the District Court's grant of summary judgment holding that, under well-accepted precedents, MANA is an original source, the court has subject matter jurisdiction over the action and that there are material disputed issues of fact, including the fact that MANA identified several thousand claims which were false even under Petitioners' interpretation of the regulations which precluded summary judgment. Pet. App. at 38-45.[4] Petitioners asserted no defense to these claims. Specifically, the Eighth Circuit held first that Section 3730(e)(4) did not bar the suit Pet. App. at 12-35. As an initial matter, the court agreed with Petitioners that Respondent's suit was "based upon the public disclosure" of its allegations because it was "supported by" and

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[2] The record includes the testimony of Chiefs of Surgery and medical staff at the Petitioner hospitals as well as the CRNA members of Respondent MANA who personally observed the fraud.

[3] The Government took no position on the jurisdictional issues.

[4] The Circuit affirmed the District Court's dismissal of the conspiracy count.

"similar to" the allegations that were publicly disclosed. Pet. App. at 28. In doing so, the court joined the *majority* of the Circuits though it expressly recognized that it was linguistically unnatural to reach such a conclusion in this case (since Respondent could not have derived its information from the public disclosure because it caused the public disclosure when it filed a related case). Pet. App. at 23. As a majority of the courts have done, the Eighth Circuit, however, interpreted the phrase "based upon" contextually to mean "supported by" rather than "derived from" in order to make sense of both the "public disclosure" and "original source" provisions. Pet. App. at 27.[5]

The Eighth Circuit went on to conclude that jurisdiction nevertheless exists because MANA is the "original source" of the allegations in this case. Pet. App. at 35. It held that "original sources" are not limited to natural persons, but also encompass Respondent, an association. Pet. App. at 29 n. 12 and 31-32. Drawing on the law of associational standing which allows associations in certain circumstances to stand in for their members, the court then held that Respondent had, through its members, "direct knowledge" of the pertinent information underlying the case (the actual facts making the claims false). Pet. App. at 29-33. The court rejected the assertion that Respondent had to give notice to the Government not only before it filed suit (which it did) but also before the public disclosure (which the statute nowhere requires). Pet App. 34-35.

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[5] If the Court had accepted Respondent MANA's interpretation of "based upon," it would not have needed to reach the "original source" issue since MANA would have standing to bring this action.

The Eighth Circuit next reversed the District Court's finding of no Article III standing based on no injury to the Government. Pet. App. at 35-38. The court stated that it need not decide whether (as the United States argued) a relator had standing to assert the Government's claim for penalties. Instead, the Eighth Circuit concluded that "the District Court erred in holding that the United States would have suffered no pecuniary injury even if the association proved false claims." Pet. App. at 36. The Eighth Circuit noted that Respondent's evidence, if proved at trial, demonstrates that lower Medicare payments would have been made if true claims had been filed. Pet. App. at 38.

The Eighth Circuit also reversed the District Court's conclusion that there was no triable issue on the merits of the false claims allegations. Pet. App. at 38-45. The court, noted that whether Petitioners understood the regulations was, under the circumstances given the evidence in the record, a jury question. Nevertheless, the court stressed that Respondent must prove a "knowing, not negligent, presentation of a false claim at trial." *Id.* at 40. On this factual record, the court concluded that there was sufficient evidence to warrant a trial where Petitioners' disputed claims of repeated mistakes and reliance on Government advice could be tested. Pet. App. at 38-45. Petitioners moved for reconsideration *en banc* asserting the very same arguments they now assert in their Petition to this Court. That motion was denied by the Eighth Circuit on or about March 25, 2002, as was Petitioners' later motion to stay the mandate.

ARGUMENT

Introduction

Respondent respectfully submits that none of Petitioners' arguments invite further review. The decision below was plainly correct and follows well-established doctrine of this Court and other Circuits. As Respondent will show below, Petitioners' claim of a split in the Circuits is illusory. Moreover, the Eighth Circuit's holdings regarding jurisdiction are fully consistent with this Court's previous statements on the issue and with the legislative intent of Congress. The bulk of Petitioners' arguments for review depend upon their own view of the evidence, which view ignores significant evidence to the contrary, expressly relied upon by the Eighth Circuit. Petitioners challenge the Eighth Circuit ruling on six grounds. None of Petitioners' issues presents a legal question that warrants further review by this Court. Indeed, this case is in an interlocutory posture, with the case remanded for trial, a posture that counsels against certiorari at this time. That counsel is especially strong where, as here, so much of Petitioners' challenges are arguments about disputed facts, which it is the very purpose of the trial to develop. Accordingly, we respectfully submit that this matter is unworthy of further review by this Court.

1. Original Source

a. Individual

As Petitioners' first and primary argument, they seek to challenge the Eighth Circuit's holding, based upon the factual record, that MANA is an "original source". MANA cannot be an "original source" they argue because it is not

a natural person. As the Eighth Circuit correctly determined, the interpretation offered by Petitioners has no support in the case law of *any* Circuit and directly contradicts the express intent for passage of the original source provision to promote relators of all types with direct knowledge of fraud to come forward and prosecute it. Pet. App. at 35. It is universally accepted that the 1986 amendments were passed to promote lawsuits by private citizens with knowledge to prosecute fraud against the Government and that the intent of those provisions was to find a balance which precluded "parasitic" persons who had no direct or substantive knowledge of the fraud from using "publicly disclosed" information to bring a False Claims Act action. Therefore, Congress plainly intended to encourage the original sources of those lawsuits to be able to prosecute them whether or not the Government intervened in the case. Senate Report No. 99-345 at 13-14. Petitioners' argument runs directly contrary to Congress' expressed intent. Their interpretation of the word "individual" would dramatically restrict the ability of persons with direct knowledge of fraud to recover damages on behalf of the Government. Petitioners' argument that because the word "individual" is used in the provision pertaining to original sources, that only single natural persons should be permitted to act as "original sources" would exclude associations, corporations, states, municipalities and all other entities from ever acting as an "original source" in a False Claims Act case. Contrary to the impression given by Petitioners, there is no split in the Circuits on this issue. Indeed, every Circuit which has considered the issue has agreed that entities, including corporations, *can* be original sources. *See, e.g., United States ex rel. Terminal Springfield Railway v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994) (railway company was original source where its employees had indirect and undisputed

knowledge); *United States ex rel. Hartigan v. Palumbo Brothers*, 797 F.Supp. 624 (N.D. Ill. 1992) (State of Illinois was "original source"); *United States ex rel. Durcholtz and Durcholtz Excavating and Construction, Inc. v. FKW, Inc.*, 997 F.Supp. 1159 (S.D. Ind. 1998) (denying summary judgment motion finding that individual and corporation were original sources); *United States ex rel. Floyd Phillips Company v. Seivers*, 1996 WL 341563 (N.D. Ill. 1996) (company was original source); *cf. United States ex rel. S. Prawer & Co. v. Fleet*, 24 F.3d 320 (lst Cir. 1994) (qui tam action by company could proceed because it was not "parasitic" of public disclosure). *United States ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.*, 183 F.3d 1088 (9th Cir. 1999) (Union was original source). The Eighth Circuit properly followed the standard set forth in this Court's decision in *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) in which this Court held that the word "individual" as used in a statute is properly interpreted to apply to corporations and other entities where Congress intended to permit broad access to a statute and imposing such a limitation would be plainly inconsistent with legislative intent. *See* Eighth Circuit Opinion at Pet. App. at 29 n. 12.[6]

As it did in interpreting the words "based upon," the Eighth Circuit looked to the legislative intent and context in which Congress used the word "individual." As the

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[6] This Court's holding in *Clinton* was recently followed by the Ninth Circuit in *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000) (where the Ninth Circuit found that the word "individual" was intended to include corporations in connection with a similar federal statute to the one at issue here).

Eighth Circuit observed, it is well-accepted that the specific purpose for the adoption of the original source provision was to legislatively reverse a previous judicial decision in the case of *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), Pet. App. at 32. In that case, the State of Wisconsin was prevented from acting as a relator because it was required by law to publicly disclose to the Government information based upon its investigation of fraud in its Medicare programs. Under the earlier version of the False Claims Act, the Seventh Circuit Court held that, as a result of this disclosure, Wisconsin, even though it was the "original source" of the disclosure, could not be a relator and could not bring a False Claims Act action. In order to address this problem with the law, numerous state Attorney Generals and the United States Attorney General urged Congress to include in the 1986 amendments to the False Claims Act an "original source" provision. Senate Report No. 99-345 at 13. The specific purpose of that provision, as recognized by the Eighth Circuit and numerous other courts, including this Court, was to permit *entities* such as the State of Wisconsin who discover fraud, even if that fraud is publicly disclosed, to pursue False Claim Act actions against the wrongdoers if those entities are the "original source" of the information.[7] Thus, it is clear that Congress' specific

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[7] *United States ex rel. Stevens*, 529 U.S. 765, 120 S.Ct. 1858 (2000); *United States ex rel. Holmes v. Consumer Ins. Group*, 279 F.3d 1245, 1259 (10th Cir. 2002); *United States v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999); *United States ex rel. Stinson v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991). In interpreting this provision, it should be kept in mind that "in 1986 Congress responded to the Seventh Circuit's invitation [in *Wisconsin v. Dean*] by amending the Act yet another time, in order to *encourage more private enforcement suits*,

(Continued on following page)

intent was to include entities such as the State of Wisconsin and MANA as "original sources" and not to restrict entities from bringing False Claims Act actions such as the one in this case.

Petitioners' reliance on this Court's most recent decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S 765 (2000) is equally misplaced and unavailing. That decision dealt with the question of whether or not a state could be a *defendant* in a False Claims Act lawsuit. The Court ruled that for numerous reasons pertaining to the legislative history of the Act and the use of the word "person" that a state could not be a defendant and, therefore, exposed to "liability" for damages. *Id.* at 787-788. The Court was not asked to address nor did it address either the "original source" requirements or any other requirements with respect to *plaintiffs* in False Claims Act actions. Nothing in this Court's decision in *Stevens* in any way supports Petitioners' proposition that Congress or this Court intended to restrict "original sources" to single natural persons. Indeed, in *Stevens*, this Court reaffirmed that the private relator's portion of the False Claims Act is constitutional.[8]

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this was done to achieve 'the golden mean' between adequate incentives for whistleblowing insiders with generally valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute on their own." Senate Rep. at 23-24 (1986) U.S.C.C.A.N. 5288-89, cited in *United States ex rel. Findley v. FPC Boron Employees Club*, 105 F.3d 675 (C.A.D.C. 1997) at 687 (emphasis supplied).

[8] The Eighth Circuit posited yet another basis for its rejection of Petitioners' argument. Under Petitioners' interpretation, the statute would permit corporations and other entities to serve as relators where there was no public disclosures and they did *not* have personal knowledge of the information but would preclude them from serving as

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Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 773-774 and 777-778 (2000).

For this reason, the Eighth Circuit was plainly correct in following this Court's decision in *Clinton v City of New York*, and holding that MANA qualifies as an original source in this case.[9] Such a conclusion comports with the familiar fact that much information gathering and reporting are organizational in nature; the "source" is often the organization as an entity, which should then bring the suit (and bear its burdens) as we have already seen in numerous cases brought by entities under the Act. This is particularly true, where as here, the fraud is widespread involving numerous defendant doctors and different hospitals.

b. Direct Knowledge

As a secondary argument, Petitioners seek review of the Eighth Circuit's determination (based upon the factual record) that MANA had direct and independent knowledge of Petitioners' fraud. As with their first issue, Petitioners cannot identify any split in the Circuits for this Court to resolve. It is undisputed that MANA's members, including MANA's Board of Directors, knew of Petitioners' fraud

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"original sources" where there was a disclosure and they did have personal knowledge of the fraud. There is nothing in the congressional record or the legislative history of the Act to explain such a seemingly arbitrary distinction. *See, e.g.,* Eighth Circuit Opinion at Pet. App. at 29 n. 12.

[9] It should be noted that Petitioners erroneously argue that the law was passed with the intention of permitting the State of Wisconsin to bring false claims only if there was no public disclosure. That is plainly not the case as can be seen from the legislative history of the Act.

because they personally observed it in the hospitals where they provided registered nurse anesthesia services. It is those nurses that provided the services which Petitioners falsely represented had been provided by the doctors. Pet. App. at 33. In addition to the knowledge of its members which the Eighth Circuit appropriately imputed to MANA, the record shows that MANA itself engaged in an independent investigation of Petitioners' fraud. This investigation included interviewing its members, hiring of attorneys to research the law, and gathering evidence (Brief of Appellant In Opposition to Appellees' Petition for Rehearing and Rehearing En Banc Tab 4 ¶ 14.) The only decisions Petitioners cite – without directly alleging a conflict, *see* Pet. 15 – involved rejections of "direct knowledge" applying the *same* legal standard to particular facts that have no counterpart here. As the Eighth Circuit explained, in both *Federal Recovery Services, Inc. v. United States,* 72 F.3d 447 (5th Cir. 1995); and *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548 (10th Cir. 1992), the corporate relators were not even in existence at the time of the uncovering of the fraud and, therefore, could not possibly have contemporaneous and direct knowledge of the conduct. Pet. App. at 31.

The Eighth Circuit correctly found that direct knowledge for the associational relator existed here, drawing on established standards for associational standing to impute members' knowledge to associations. Pet. App. at 31-35.[10]

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[10] Cases in this Court have made no distinction based on whether the association was formally incorporated or not. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167 (2000); *compare with Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434 (1977); *see also Federal Electron*

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Under those standards, an association has standing when its members would have standing, "the interests at stake are germane to the organization's purposes," and individual members' participation is not needed for the relief sought. *Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 181 (2000). In the present context, an association like Respondent has direct knowledge of what its members know on the very subject that defines the association's purpose – here, the promotion of the practice of nurse anesthesia.[11] Just as the relators in *Springfield Railway* and *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Acc. Ins. Co.*, 721 F.Supp. 1247 (S.D. Fla. 1989), were allowed to pursue their claims, Respondent MANA, has the right to rely both upon the fruits of its own investigation, as well as the

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Comm'n v. Massachusetts Citizens for Life, Inc., 474 U.S. 238, 263-264, 107 S.Ct. 616 (1986).

[11] The Eighth Circuit's ruling, borrowing from associational standing law, plainly would not encompass Petitioners' hypothetical about the Sierra Club being attributed knowledge of its nurse anesthetist members on anesthesia billing practices. Petitioners posit a hypothetical slippery slope argument concerning the Sierra Club. The argument is inapposite because MANA's express purpose was to promote the practice of anesthesia and to support nurse anesthetists to provide anesthesia in hospitals. (Pet. App. at 15) Thus, the purpose of the organization was directly related to the information being gathered by its members concerning the practice of anesthesia in Minnesota hospitals which the Eighth Circuit imputed to MANA. In contrast, the Sierra Club has no relationship to the provision of anesthesia nor are its members required to be Certified Registered Nurse Anesthetists. Furthermore, as noted as the Eighth Circuit found, the record demonstrates that MANA also conducted its own independent investigation and, thereby, obtained its own knowledge of the fraud in question.

knowledge of its members, to prosecute Petitioners' fraud.[12]

c. Pre-suit Disclosure

As a third argument, Petitioners also ask this Court to write additional requirements into the False Claims Act which would restrict prosecution of fraud. Petitioners ask this Court to hold that original sources are required to voluntarily disclose information concerning the fraud to the Government before the public disclosure occurs instead of before they file suit as the statute states. We respectfully submit that the Eighth Circuit correctly declined to rewrite the statute in this manner. Petitioners do not dispute the Eighth Circuit's statement that such a requirement "has no textual basis in the statute" (Pet. App. at 34) or the court's explanation that imposition of an additional requirement would alter the "balance" struck by Congress. Pet. App. at 35. Instead, Petitioners rely on two decisions discussing pre-disclosure notice. However, the statements in those decisions do *not* create a conflict in governing law warranting review. In *United States ex rel. Findley v. FPC Boron Employees' Club*, 105 F.3d 675 (D.C.

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[12] Contrary to Petitioners' representation, there was dispute below as to the corporate status of MANA. It was Petitioners' counsel that advised the Court at oral argument that MANA was an unincorporated association (see oral argument at 40 minutes 58 seconds, available at the Court's web site). In fact, as was developed in connection with Petitioners' motions for reconsideration *en banc*, the factual record was unclear on this point. Nevertheless, for the reasons expressed herein, whether or not MANA was an incorporated association or simply an unincorporated association at the time the Complaint was filed makes no difference under the facts at issue as was recognized by the Eighth Circuit when it denied Petitioners' motion for rehearing on this issue.

Cir. 1997), the statement concerning disclosure was *dictum*, because the express reason given for disqualifying the relator as an original source was *not* late notice, but rather his lack of knowledge of the information until after public disclosure. 105 F.3d at 690. In *United States ex rel. McKenzie v. Bell South Telecom, Inc.*, 123 F.3d 935 (6th Cir. 1997), the Court critically emphasized the fact that the relator was not even the source of the public disclosure, which had been made by third parties independently stating: "Anyone who alerts the Government and is a 'true whistleblower' deserves any reward that may be obtained by pursuing a qui tam action under the FCA. However, the individual who sits on the sidelines while others disclose the allegations that form the basis of her complaint should not be able to participate in any award." *Id.* at 943. Both decisions made an overtly non-textual judgment on the facts before them that a "parasitic" relator who did not perform the contemplated role of bringing the relevant information to light should not be able to take advantage of the Act's provisions.

Unless and until the *Findley* and *McKenzie* Circuits expand their rulings to cover the present situation, there is no conflict in the Circuits which warrants review. Because a blanket pre-disclosure notice requirement is so clearly unfounded in the text, and would not be justified under the more general policy terms invoked in this case, there is no good reason to assume that those Circuits would adopt a blanket rule. Meanwhile, otherwise-qualifying relators presumably can simply adjust the timing of their Government disclosures. It would be distinctly unjust to oust (or further delay trial on) a suit like this one (filed in 1994) on the basis of such a nontextual requirement that, had it been expressed, could easily

have been satisfied by Respondent. Furthermore, there is nothing in the legislative history or the wording of the False Claims Act which would suggest that Congress would have wished that relators such as MANA, who are the only original source of the information, should be precluded from prosecuting fraud merely because they were forced to publicly disclose it before they had an opportunity to disclose their information to the Government.[13] Such a holding would be inconsistent with Congress' intent as expressed in the statute to "reward persons who discovered and revealed fraud rather than confiscating their claims." Pet. App. at 35. In fact, the legislative history directly contradicts such a conclusion. Senator Grassley, the main sponsor of the 1986 amendment, specifically stated that the sole purpose of the "voluntary disclosure" requirement was to prevent relators whose disclosures to the Government had been involuntarily compelled by "subpoenas" to then achieve a windfall by filing a False Claims Act action. As the Senator explained, the purpose of the use of the word "voluntary" was to avoid such an incongruous result.[14] Cong. Rec. S11238-04. The

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[13] Since under the False Claims Act, complaints must be filed under seal for 60 days, Respondent was precluded from seeking relief from the Court on an emergent basis by way of a False Claims Act complaint. *See* 31 U.S.C. § 3730.

[14] Petitioners' reliance on a fragment of a statement made by one of the members of the House of Representatives is misplaced and misguided. There is no way to make sense out of this statement since it implies that disclosure of the false claims information to the *news media* would *not* constitute public disclosure but *would* satisfy the requirement of disclosure to the government. No court has ever interpreted the original source requirement to so provide and there is nothing in the text of the provision itself to support such an interpretation.

undisputed facts in this case are that MANA voluntarily disclosed its information concerning the fraud to the Government and was never under a subpoena or investigation prior to doing so. *See, e.g. United States ex rel. Precision Company v. Koch Industries*, 1995 WL 812134 Slip Op. at 10 (N.D. Okla.)[15] Accordingly, for the foregoing reasons, there is no purpose for interlocutory review of the Eighth Circuit's ruling on this issue.

2. Other Issues

Petitioners present several other attacks on the Eighth Circuit ruling. Pet. 18-19. These fact-specific challenges present no legal issue. Instead, they make pleas against liability based on misreadings of the Eighth Circuit's opinion or objections to its holding that the record in this case creates a triable issue on critical fact questions. None of these challenges merits review.

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[15] Petitioners inaccurately state that the record shows that the only information supplied to the Government were facts in the public record. As the Eighth Circuit acknowledged and as was further explicated in oral argument, the Department of Justice was fully informed of the identity of witnesses, documents and other information at the time of filing of the complaint by MANA's counsel. Pet. App. 34. MANA's counsel was told to retain the documents and to await further instructions at that time and many of those witnesses and documents were later reviewed by the Government in depth as was testified to at length. (See oral argument between minutes 13 and 14, available at the Court's web site.) Significantly, the Government has never at any time during this process maintained that it did not receive full and complete cooperation from MANA and its members. Indeed, the Government filed an amicus brief in support of MANA's appeal which brief specifically stated that the Government had "authorized MANA to proceed with its False Claims Act action." *See* Amicus Brief at p.13.

a. Injury

As noted by the Eighth Circuit, Petitioners' argument that MANA lacks standing against the hospitals because it cannot establish injury is without merit. As a preliminary matter, the False Claims Act clearly provides for recovery against defendants who submit false claims whether or not those false claims are ever paid. This Court, seven Circuits and twenty-seven courts overall have so held.[16]

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[16] *See, e.g.*, United States Supreme Court: *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549-552 (1943); Second Circuit: District Court: *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986); *United States v. Rapoport*, 514 F.Supp. 519, 524 (S.D.N.Y. 1981); *United States v. Silver*, 384 F.Supp. 617, 620 (E.D.N.Y. 1974), *aff'd mem.*, 515 F.2d 505 (2d Cir. 1975); Third Circuit: *United States v. Tieger*, 234 F.2d 589, 590 & n.4 (3d Cir.), *cert. denied*, 352 U.S. 941 (1956); *United States v. Rohleder*, 157 F.2d 126, 129 (3d Cir. 1946); District Court: *United States v. Kensington Hospital*, 760 F.Supp. 1120, 1227 (E.D. Pa. 1991); *United States v. Zulli*, 418 F.Supp. 252, 253 (E.D. Pa. 1975); *United States v. American Precision Products Corp.*, 115 F.Supp. 823, 827-828 (D.N.J. 1953); Fourth Circuit: *Tbepleman v. United States*, 263 F.2d 697, 699 (4th Cir.), *cert. denied sub nom, Cato v. United States*, 359 U.S. 989 (1959); District Court: *United States v. CFW Construction Co.*, 649 F.Supp. 616, 618 (D.S.C. 1986); Fifth Circuit: *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460-461 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *United States v. Rigdela State Bank*, 357 F.2d 495, 497 (5th Cir. 1966); District Court: *Thevenot v. National Food Insurance Program*, 620 F.Supp. 391, 396 (W.D. La. 1985); Sixth Circuit: District Court: *United States ex rel. Pogue v. American Healthcorp., Inc.*, 914 F.Supp. 1507, 1509 (M.D. Tenn. 1996); *Wilkins ex rel. United States v. State of Ohio*, 885 F.Supp. 1055, 1060 (S.D. Ohio 1995); Seventh Circuit: *United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978); *United States v. First National Bank of Cicero*, 957 F.2d 1362, 1373 n.11 (7th Cir. 1992); District Court: *United States ex rel. Fahner v. Alaska*, 591 F.Supp. 794, 798 (N.D. Ill. 1984); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F.Supp. 611, 628 (W.D. Wis. 1995); Ninth Circuit: *United States ex rel. Hagood v. Sanoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991); Tenth Circuit: *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir.

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More importantly, the Eighth Circuit did not even *reach* this issue. Instead, it held, relying on the amicus brief submitted by the United States Government, that the hospitals *did* cause damage to the Government. Pet. App. at 38. Amicus Brief pp. 17-18. For example, hospitals certified in thousands of bills that it was medically necessary for two providers to provide anesthesia to patients in difficult cases such as heart transplants, brain surgery, etc., when they knew that only one provider was providing those services. As a result of these false bills, Medicare actually paid "double" the cost of the procedure. Pet App. 38; United States Amicus Brief at 17-18. Thus, the hospitals did substantially damage the United States Government. Based upon the foregoing, no further review of the Eighth Circuit's decision is necessary at this time.

b. Falsity and Government Advice

As one of their subsidiary arguments, Petitioners claim that with respect to a certain portion of the alleged false claims, they believed they were obeying the rules and that they were following Government advice. These are fact-specific arguments which go to state of mind and credibility which must be made to a jury as the Eighth

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1964), *cert. denied*, 380 U.S. 907 (1965); District Court: *United States v. Johnston*, 138 F.Supp. 525, 527-28 (W.D. Okla. 1956); Eleventh Circuit: *United States v. Killough*, 848 F.2d 1523, 1533 (11th Cir. 1988); District Court: *United States ex rel. Luther v. Consolidated Industries, Inc.*, 720 F.Supp. 919, 923 (N.D. Ala. 1989); *United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F.Supp. 1247, 1258-59 (S.D. Fla. 1989), citing *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 827 (S.D.N.Y. 1986); Court of Claims: *Brown v. United States*, 524 F.2d 693, 706 (Ct. Cl. 1975).

Circuit recognized. Pet. App. at 39-40. The Eighth Circuit further pointed out that defendants would not be liable for false claims unless Respondent proves "knowing, not negligent, presentation of a false claim at trial." Petitioners' claim of undisputed government advice is fact-specific and misconstrues the record. The portions of the record presented to this Court by Petitioners is incomplete in several material respects. Rather than being undisputed, Petitioners' conclusions in this regard are hotly disputed by Government officials and, as the Eighth Circuit acknowledged, there is extensive evidence in the record to suggest that the Petitioners knew very well that they were violating the rules and that their actions were contrary to the interpretations imposed by the Health Care Finance Administration. In particular, the record demonstrates that one of the Medicare intermediaries in Minnesota, Blue Cross Blue Shield, issued both a letter in 1987 and a bulletin in 1988 which was sent directly to several of the Petitioners and was widely circulated and available to other Petitioners which was written by a high-ranking HCFA official. That letter states that the anesthesiologist who wants to work with a CRNA must be "continuously present with the CRNA throughout the case" to bill for "personal performance." *See* Appendix for Appellant A-609. MANA also presented evidence of proposed rules and comments published in the federal register which clearly placed the Petitioners on notice that they could not leave the room for substantial periods of time and bill for personally performing cases. Appendix for Appellant A-575. MANA also presented affidavits from Medicare that MANA's interpretation of the rules was correct (Pet. App. at 239-241) as well as letters and testimony from James Menas and Charles Booth, the HCFA officials responsible for interpreting the rules, who confirmed that Respondent's interpretation is correct. Respondent's Brief In

Opposition To Rehearing, Tab 3 p. 80-81, 86. More importantly, Petitioners claim that they could leave the operating room and travel throughout the hospital while billing for "personally performing" cases defies common sense. This is particularly true because it is undisputed that the CRNAs who remained in the room sometimes for up to six or seven hours and directly provided the anesthesia to the patients receive no payment from Medicare where the anesthesiologist billed for personally performing the case. Thus, Petitioners' claim is that they honestly believed that the government passed a regulation which allowed them to leave their patient and bill the same amount as if they had directly provided all anesthesia services during surgery to the patient. At the same time, the government would not reimburse the CRNA who actually provided those services in the operating room one penny. As the Eighth Circuit correctly determined, Respondent should have a right to test this dubious claim concerning Petitioners' subjective intent before a jury.

Petitioners attack the Eighth Circuit's decision claiming once again a split in the Circuits. However, such split is illusory. Petitioners cite no conflicting authority and no other Circuit precedent which is inconsistent with the Eighth Circuit's holding. The Petitioners cite only two decisions to support their argument – one of which (*United States ex rel. Oliver v. Parsons Co.,* 195 F.3d 457, 463 (9th Cir. 1999)) expressly *endorses* the principle underlying the Eighth Circuit's holding. The Eighth Circuit opinion merely reasons that where, as in this case, there is evidence that a regulation has been enforced and interpreted to prohibit conduct by the agency responsible, a jury trial is appropriate to determine whether defendants' conduct was "knowing" under the False Claims Act or was merely a mistake based on "good faith" as defendants claim. The contrary position urged by Respondent would render the

regulations unenforceable because, as the Government points out, a clever defendant's counsel could easily conjure up post facto interpretations of the regulation which would excuse the defendant's conduct. Pet. App. at 38-39; United States Amicus Brief at pp. 24-26. Furthermore, contrary to Petitioners' Respondent's claim, there is no dispute as to how HCFA interpreted the meaning of the regulations. (See n.17 *infra*), Pet App. 11, 40, 42. The Eighth Circuit relied on this evidence, which was ignored by Petitioners and the District Court to conclude a dispute of fact exists. The court considered Petitioners' disputed claims (1) that a Travelers functionary advised them that they did not have to stay in the operating room with their patients the whole time; and (2) that HCFA issued a 1993 bulletin which defendants believed supported this position.[17] The Eighth Circuit correctly determined that Petitioners claimed reliance upon the 1993 HCFA bulletin in question was a jury question. The court observed that the bulletin was quickly clarified within a matter of months by a representative of HCFA who clearly explained that the Petitioners could "not leave the room" in a personally performed case. Pet. App. at 42. As that letter

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[17] Petitioners neglected to advise this Court that the letter written by Travelers was written only to an in-house lawyer for Petitioner Allina who admitted in his deposition that he *did not rely* on the letter because he knew that the information was incorrect because he had been told otherwise by "investigative officials" and had reviewed carrier bulletins which he concluded clearly required anesthesiologists to stay in the room in "personal performance" cases. Respondent's Brief In Opposition To Rehearing, tab 3, p. 69. That attorney further advised that he did not disclose the letter to any of the other Petitioners in this case and, accordingly, they could not have relied upon it. *Id.* at 67; Appellants' Appendix at 2482, 2485.

pointed out, "technically there would be nobody for the doctor to hand the case off to" because the CRNA involved in the case was not being paid and not considered by HCFA to be performing the case. Pet. App. at 42-43. Thus, any ambiguity which allegedly existed was quickly rectified. Nevertheless, the Petitioners continued to bill improperly for a significant period of time thereafter until they were directly ordered to stop by the Government. As set forth in Pet. App. at 38-45, *Covington v. Sisters of the Third Order of St. Dominicks of Harford, California*, 61 F.3d 909 (9th Cir. 1993); and *Anesthesiologists Affiliated v. Sullivan*, 941 F.2d 678 (8th Cir. 1991), courts have observed that whether or not hospitals or doctors did all they could to comply with the regulations, even where it is alleged that agents of the Government supplied incorrect advice, is at best a factual issue which must be decided by a jury taking all of the evidence in the record into account, including the Petitioners' credibility. Additionally, the Eighth Circuit correctly noted that there was substantial evidence in the record that Petitioners *knew* they were fraudulently billing and were attempting to *conceal* their fraud from the Government. Pet. App. at 45. This evidence included testimony that Petitioners intentionally altered times, numbers and other information on patient medical records and threatened CRNAs who attempted to document their conduct. One of the Petitioners openly admitted that he knew they were falsely billing. Pet. App. at 44-45. A Unity/Mercy Hospital doctor observed that attending meetings and leaving the operating room while billing for personally performing cases was "not right" and they

would eventually "get caught" (Brief in Opposition to Rehearing and Rehearing En Banc Appendix p. 48).[18]

Finally, Petitioners' claim, that HCFA's interpretation that the personal performance statute required them to remain in the room is central to this case, is itself incorrect. The record examined by the Eighth Circuit supports a jury finding that Petitioners established a custom and practice which failed to satisfy even the most minimum requirements for anesthesia reimbursement because they failed to participate in emergence, failed to be present at demanding parts of the anesthesia plan, and failed to remain continuously involved in personally performed cases. Pet. App. at 44-46. In many cases they never even entered the operating room. Pet App. 43-45. Based upon this extensive evidence, the Eighth Circuit correctly determined that there are material disputes of fact which require a jury to decide this issue. For these reasons review should be denied.

(c) Petitioners' final argument which pertains to the "emergence" requirement is not worthy of further review because it is heavily fact-laden. As the Eighth Circuit correctly determined, there is substantial evidence in the record that HCFA, MANA's members and the doctors

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[18] In addition, as the Eighth Circuit noted, MANA presented extensive evidence in the record that defendants submitted false claims that would not justify reimbursement under even their own nonsensical interpretation of the rules. Pet. App. at 44-45. For example, they billed for "personal performance" of anesthesia when they were actually providing and billing for anesthesia in other operating rooms at the same time. In fact, as the Government recognized in its amicus brief, MANA identified numerous claims submitted by Petitioners to which Petitioners asserted no legal defense at all. United States Government Amicus Brief at p. 18.

clearly understood that personal participation in emergence required, at a minimum, being present in the operating room at the end of the surgery. Pet. App. at 46-47. Petitioners' claims in depositions that they believed that they could satisfy this requirement by visiting the patient, or calling him on the telephone three days later are patently absurd.[19] The foregoing demonstrates that this is an issue of fact for the jury and certainly is not worthy of further review by this highest Court.

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[19] Contrary to Petitioners' representation, MANA presented substantial medical evidence concerning the meaning of the term "emergence", including testimony of the very HCFA official who drafted the regulations, excerpts from a well-accepted treatise on anesthesiology, and the testimony of numerous CRNAs, including MANA's billing expert who participated in the drafting of the original provisions which would support a finding that Petitioners' interpretation of the statute pertaining to "emergence" is plainly wrong. Pet. App. at 46-47. The Eighth Circuit recognized the District Court could not ignore this evidence which created a material disputed fact on this issue. Pet. App. at 47.

CONCLUSION

Petitioners' Petition raises no new significant or important issues. The Eighth Circuit's well-considered opinion is fully consistent with existing precedent as well as decisions of this Court. For the foregoing reasons, review by this Court is both unnecessary and unwarranted. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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